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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA  
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12                  KEVIN S.,

13                  Plaintiff,

14                  v.

15                  COMMISSIONER OF SOCIAL  
16                  SECURITY,

17                  Defendant.

18                  CASE NO. 3:20-CV-5355-DWC  
19  
20                  ORDER ON MOTION TO DISMISS  
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22                  Before the Court is Defendant's Motion to Dismiss Amended Complaint (the "Motion").  
23 Dkt. 27. Plaintiff filed a Complaint appealing the denial of an application for disability insurance  
24 ("DI") benefits pursuant to 42 U.S.C. §§ 401–33 of the Social Security Act, and alleging a "civil  
action for deprivation of rights" under 42 U.S.C. § 1983 based on a violation of Plaintiff's right  
to appeal and/or due process. Dkt. 9. After the Court dismissed Plaintiff's Complaint for failure  
to identify an appealable final decision, Plaintiff filed an Amended Complaint. Dkts. 23, 24.

25                  In the Motion, Defendant seeks dismissal of the Amended Complaint based upon  
26 Plaintiff's failure to identify an appealable final agency decision. Plaintiff filed a Response and  
27 Defendant filed a Reply. Dkts. 29, 30. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil  
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1 Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by  
 2 the undersigned Magistrate Judge. *See* Dkt. 12.

3 Based on the pleadings on file with the Court, Plaintiff has failed to show he has a final  
 4 decision he can timely appeal. In its Order on Motion to Dismiss the original Complaint, the  
 5 Court found Plaintiff's allegations based on his benefits claim from 2012 to be time-barred. Dkt.  
 6 23. Plaintiff alleges he filed new claims in 2017 and 2018, but has not shown a final decision  
 7 from the Social Security Administration ("SSA"), and has not shown the Court should waive the  
 8 requirements of administrative exhaustion. Plaintiff has thus failed to state a claim upon which  
 9 relief can be granted, and this action is therefore dismissed.

10 **LEGAL STANDARD**

11 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a  
 12 complaint on the grounds it "fails to state a claim upon which relief can be granted." To state a  
 13 claim for which relief may be granted, a complaint must contain "enough facts to state a claim to  
 14 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

15 **FACTUAL AND PROCEDURAL HISTORY**

16 On April 13, 2020, Plaintiff filed a Declaration and Application to Proceed *In Forma*  
 17 *Pauperis*, which the Court granted. *See* Dkts. 1, 7–8. Plaintiff then filed his Complaint, alleging  
 18 Defendant denied Plaintiff's claim for DI benefits, and deprived him more than once of his right  
 19 to appeal or right to due process. Dkt. 9, p. 2. Plaintiff did not specify the date on which  
 20 Defendant's alleged denial of benefits occurred. *See id.* In his request for relief, Plaintiff listed  
 21 several possible relevant years, asking that "[t]he final decision of Defendant be reversed and set  
 22 aside; 2012 and 2017 appealed no hearing date." *Id.* Plaintiff further requested "benefits to be  
 23 paid in full as of active last date of 2012 and appeal, and filing 2015 and appeal." Dkt. 9, p. 3.

1 On August 24, 2020, Defendant filed a Motion to Dismiss the Complaint (the “First  
2 MTD”). Dkt. 20. Defendant averred an administrative law judge (“ALJ”) issued a decision on  
3 February 17, 2012, denying Plaintiff’s DI benefits application. Dkt. 20, pp. 3, 5–19. The Appeals  
4 Council denied Plaintiff’s request for review of the ALJ’s decision on April 23, 2013, and notice  
5 of that decision was mailed to Plaintiff and his representative. Dkt. 20, pp. 3–4, 25–30. Plaintiff  
6 did not dispute he received this notice. Defendant averred it had no record of any other final  
7 decisions involving Plaintiff. Dkt. 20, p. 4.

8 On reply, Plaintiff submitted three pieces of correspondence from the SSA, although he  
9 did not explain their relevance in his brief. *See* Dkt. 21. First, Plaintiff submitted a letter, dated  
10 October 22, 2018, in which the SSA informed Plaintiff he is not eligible for supplemental  
11 security income (“SSI”) benefits because his monthly income is too high. Dkt. 21, p. 2. Second,  
12 Plaintiff submitted a letter, dated February 5, 2019, in which the SSA indicated it had received a  
13 form from Plaintiff requesting a hearing before an ALJ, which was being treated as a request for  
14 reconsideration of an earlier decision based on SSA rules. Dkt. 21, pp. 6. Third, Plaintiff  
15 submitted a letter, dated March 18, 2019, in which the SSA informed Plaintiff he did not qualify  
16 for DI benefits because he had not worked long enough to be eligible. Dkt. 21, p. 4. It is not clear  
17 that Plaintiff submitted the entirety of any of these three letters. *See* Dkt. 21, pp. 2–7.

18 On September 29, 2020, the Court granted Defendant’s First MTD. Dkt. 23. However, in  
19 the interest of fairness, and because this matter is still at the pleading stage, the Court gave  
20 Plaintiff 30 days to file an amended complaint identifying an appealable final decision relating to  
21 the communications referenced in his reply to the First MTD. *Id.*, pp. 7–8.

22 Plaintiff filed his Amended Complaint on October 9, 2020. Dkt. 24. In it, Plaintiff alleged  
23 he had applied for DI and SSI benefits, but was denied in a 2012 decision. *Id.*, pp. 2–3. He  
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1 further alleged he filed a new claim in 2017, and appealed the denial of this claim, but heard  
 2 nothing from the SSA. *Id.*, p. 3. Plaintiff alleged he filed another new claim in 2018. *Id.*

3 On October 30, 2020, Defendant filed the present Motion, once again asking the Court to  
 4 dismiss Plaintiff's claims. Dkt. 27. Plaintiff timely filed a response, and Defendant timely filed a  
 5 reply. Dkts. 29–30.

6 DISCUSSION

7 **1. Plaintiff Has Failed to Identify an Appealable Final Decision**

8 Plaintiff referenced three claims in his Amended Complaint, from 2012, 2017, and 2018.  
 9 Dkt. 24, pp. 2–3. The Court has already ruled Plaintiff's 2012 claim is time-barred. Dkt. 23, pp.  
 10 5–6. Plaintiff has failed to identify facts relating to his 2017 and 2018 claims showing they are  
 11 final administrative decisions. As the Court explained in its first Order, “[42 U.S.C. §] 405(g)  
 12 provides that a civil action [appealing a denial of benefits] may be brought only after (1) the  
 13 claimant has been party to a hearing held by the Secretary, and (2) the Secretary has made a final  
 14 decision on the claim.” *Bass v. Soc. Sec. Admin.*, 872 F.2d 832, 833 (9th Cir. 1989); *see also*  
 15 *Califano v. Sanders*, 430 U.S. 99, 102 (1977) (“The [Social Security] Act and regulations thus  
 16 create an orderly administrative mechanism, with district court review of the final decision of the  
 17 Secretary . . .”). “[T]he Commissioner's decision is not final until the Appeals Council denies  
 18 review or, if it accepts the case for review, issues its own findings on the merits.” *Brewes v.*  
 19 *Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1162 (9th Cir. 2012). Plaintiff has presented no  
 20 facts indicating the claims he filed in 2017 and 2018 are final decisions. The only remaining  
 21 issue is whether Plaintiff has shown the requirement of administrative exhaustion should be  
 22 waived. As explained below, Plaintiff has not done so.

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1           **2. Plaintiff Has Failed to Establish Waiver of Administrative Exhaustion**

2         Plaintiff argues the Court should waive the requirement that he exhaust his administrative  
 3 remedies because he has attempted to get a hearing on his claims, but has been unable to do so.  
 4 Dkt. 29, pp. 4–5. “A claimant’s failure to exhaust the procedures set forth in the Social Security  
 5 Act, 42 U.S.C. § 405(g), deprives the district court of jurisdiction.” *Bass*, 872 F.2d at 833. Those  
 6 procedures are that a claimant must present the claim to the SSA and obtain an initial  
 7 determination, seek reconsideration, and, after reconsideration, request a hearing before an ALJ.  
 8 *Id.* (citing 20 C.F.R. §§ 404.900(a)(1)–(3), 404.909, 404.920, 404.933). The claimant must then  
 9 request review by the Appeals Council, and the decision of the Appeals Council, whether it is a  
 10 grant or denial of review, becomes a final decision appealable to this Court. *Bass*, 872 F.2d at  
 11 833 (citing 20 C.F.R. §§ 404.900(a)(5), 404.955, 404.981). There is no dispute Plaintiff has not  
 12 had a hearing before an ALJ on his 2017 and 2018 applications, and has not received a decision  
 13 from the Appeals Council.

14         A district court can waive the exhaustion requirement, but only if the claimant satisfies a  
 15 three-part test. *Bass*, 872 F.2d at 833. “The claim at issue must be (1) collateral to a substantive  
 16 claim of entitlement (collaterality), (2) colorable in its showing that refusal of the relief sought  
 17 will cause an injury which retroactive payments cannot remedy (irreparability), and (3) one  
 18 whose resolution would not serve the purposes of exhaustion (futility).” *Cassim v. Bowen*, 824  
 19 F.2d 791, 795 (9th Cir. 1987). Plaintiff’s claims are not collateral to his substantive claims of  
 20 entitlement; they directly concern those claims, as the issue is whether he is entitled to disability  
 21 benefits. Plaintiff has failed to meet the requirements for waiver of administrative exhaustion.

22         A final point of clarification is necessary on Plaintiff’s claims. His claims based on the  
 23 2012 application for benefits are dismissed with prejudice, as they are time-barred. Plaintiff’s  
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1 claims based on 2017 and 2018 applications for benefits are dismissed without prejudice, as  
2 Plaintiff has failed to exhaust administrative remedies. *See Ingram v. Comm'r of Soc. Sec.*, 401  
3 F. App'x 234, 235 (9th Cir. 2010) ((holding dismissal without prejudice is appropriate for claims  
4 dismissed for failure to exhaust administrative remedies); *O'Guinn v. Lovelock Corr. Ctr.*, 502  
5 F.3d 1056, 1063 (9th Cir. 2007) (same). Plaintiff may not amend his complaint again in this  
6 action. However, this Order does not prevent Plaintiff from bringing a new action, and if he does  
7 decide to bring a new action he should first exhaust his administrative remedies with respect to  
8 the 2017 and 2018 applications for benefits.

9 CONCLUSION

10 For the reasons stated above, Defendant's Motion is GRANTED. The Complaint is  
11 DISMISSED with prejudice with respect to Plaintiff's claims relating to his 2012 application for  
12 benefits, and without prejudice with respect to Plaintiff's claims relating to his 2017 and 2018  
13 applications for benefits.

14 Dated this 17th day of December, 2020.

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17 David W. Christel  
18 United States Magistrate Judge  
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